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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN SMALL BUSINESS LEAGUE,

Petitioner,

v.

UNITED STATES SMALL
BUSINESS ADMINISTRATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a case of first impression, the Ninth Circuit affirmed the District Court's interpretation of a 2007 amendment to the Freedom of Information Act ("FOIA") which defined "agency records" as including " (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management." 5 U.S.C 552(f) (2)(b). The Ninth Circuit agreed with the District Court that the phrase "for the purposes of records management" limited the definition of agency records to encompassing only records maintained by a contractor pursuant to a contract limited in scope to records management. Petitioners disagree, and interpret the amendment as extending FOIA to include records maintained and managed by a Government contractor in connection with other services that contractor supplies to the agency.

Petitioners brought a FOIA action to compel the Small Business Administration ("SBA") to produce telephone records reflecting calls made by Michel Stamler, Director of the SBA's Press Office on Stamler's SBA – issued Blackberry device through the Verizon network. SBA claimed that it no longer had the phone records, and was under no obligation to obtain copies of such records from Verizon, despite the fact that Verizon maintained the documents pursuant to Verizon's contract with the SBA.

The Ninth Circuit interpreted the 2007 FOIA amendment quoted above as limiting the definition of

Agency records to those maintained by third party contractors whose contracts are limited to document management services, as opposed to contractors who store documents in connection with other services rendered to the agency. In doing, so the Court of Appeals interpreted statutory language intended to expand the scope of FOIA in a manner which in fact limits the Act, and effectively abrogates the "constructive control" doctrine adopted by other circuits

Only one question is presented in this Petition:

Does the 2007 amendment to the Freedom of Information Act defining agency records as those "maintained for an agency by an entity under Government contract, for the purposes of records management" encompass only those records which are maintained pursuant to a contract limited in scope to records management, or does it encompass records maintained by a contracting entity as part of other services rendered to the agency?

LIST OF PARTIES AND CORPORATE DISCLOSURE

The parties are listed in the caption. Petitioner American Small Business League is a California Corporation which has no parent corporation and no publicly held company has any ownership interest in the American Small Business League.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND CORPORATE DISCLOSURE	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS TO ALLOW THE WRIT	3
I. Review is Warranted to Resolve an Important Question of Federal Law	4
A. The Ninth Circuit's Determination That the Amendment "Codifies" the Constructive Control Theory Creates a Conflict Among the Circuits	4
B. The Court of Appeal's Interpretation of the 2007 Amendment Misapplies Rules of Statutory Construction	8
CONCLUSION	9

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED OCTOBER 15, 2010 ..... 1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED JULY 1, 2009 ..... 6a

TABLE OF CITED AUTHORITIES

Page

CASES

Bloomberg v.
Bd. of Governors of Fed. Reserve Sys.,
649 F. Supp. 262 (S.D.N.Y. 2009) 7

Bureau of Nat'l Affairs, Inc. v.
United States Dep't of Justice,
742 F.2d 1484 (D.C. Cir. 1984) 5

Burka v. U.S. Department of Health and Human Services,
87 F.3d 508 (D.C. Cir. 1996) 7

Department of Air Force v. Rose,
425 U.S. 352 (1976) 4

Department of Justice v.
Reporters Comm. for Freedom of Press,
489 U.S. 749 (1989) 5

Gallant v. NLRB,
26 F.3d 168 (D.C. Cir. 1994) 5

Grand Cent. Partnership, Inc. v. Cuomo,
166 F.3d 473 (2d Cir. 1999) 5

Hercules v. Marsh,
829 F.2d 1027 (4th Cir. 1988) 6

Huffman v. Comm'r of Internal Revenue,
978 F.2d 1139 (9th Cir. 1992) 8

Cited Authorities

	Page
In Defense of Animals v. National Institute of Health, 543 F. Supp. 2d 70 (D.D.C. 2008)	6
Missouri ex rel Garstang v. U.S. Dep't of Interior, 297 F.3d 745 (8th Cir. 2002)	7
Na Iwi Na Kapuna O Makapu v. Dalton, 894 F. Supp. 1397 (D. HI 1995)	6
United States Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989)	5
United States Department of State v. Ray, 502 U.S. 164 (1991)	4
STATUTES	
5 U.S.C § 552	1
5 U.S.C § 552(f)(2)	5
5 U.S.C § 552(f)(2)(b)	1, 7
28 U.S.C. § 1254(1)	1
OTHER MATERIAL	
Pub.Law No. 110-175 121 Stat. 2524	5

OPINION BELOW

The opinion of the Ninth Circuit has been designated for publication but has not yet been published in the Official Reports. It is identified as Case 09-16756, ID: 7509425, Docket Entry 22-1. The unpublished order of the United States District Court for the Northern District of California is identified as 3:09-CV 10198 EMC, Document 18. *See* Appendices A, B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1). The Ninth Circuit's opinion was filed October 15, 2010.

STATUTORY PROVISIONS INVOLVED

This case involves the definition of "agency records" as defined in the Freedom of Information Act, 5 U.S.C. 552, and specifically 5 U.S.C 552(f)(2)(b), which defines an agency record subject to disclosure as " (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management."

STATEMENT OF THE CASE

In this FOIA case, the American Small Business League seeks phone records reflecting wireless

communications by SBA Press Director Michael Stamler. The SBA stated that those phone records were no longer retained in the Agency's files. The SBA took the position that it had no obligation under the Freedom of Information Act to retrieve copies of these records from its wireless service provider. The American Small Business League ("ASBL") contends that because the wireless service provider maintained records in the course of providing service to the SBA, and advertised that such records were maintained for the benefit of its customers, the SBA had an obligation to retrieve such records in the custody of its provider in response to a FOIA request under both well established case law and the 2007 amendment to the Freedom of Information Act.

On March 12, 2008, following an unsatisfactory response to its FOIA request, ASBL filed a complaint in the District Court seeking to compel a further search by the SBA for responsive telephone records. In response, the SBA filed concurrent motions, seeking to have the action dismissed for lack of subject matter jurisdiction, contending that ASBL failed to exhaust its administrative prerequisites prior to filing the action, and alternatively for summary judgment, on the grounds that the SBA undertook "a search reasonably calculated to find responsive records". ASBL filed a cross motion on the grounds that the evidence presented in support of the SBA's motions disclosed that the Agency had undertaken a search of only one of several phone numbers which may have been used by Mr. Stamler. ASBL sought an order from the court compelling the Agency to review additional records, particularly Verizon records of Stamler's agency-issued "Blackberry" cell phone, the existence of which was disclosed by the SBA in a declaration submitted in support of its Motion for Summary Judgment.

Following oral argument, the District Court requested and the parties provided additional briefing on the issue of whether the SBA had an obligation under the Freedom of Information Act to recover copies of the call records maintained by the cell phone provider for the Agency. Following the supplementary briefing, and without further oral argument, on July 7, 2009, the District Court denied the SBA's motion to dismiss for lack of subject matter jurisdiction, but granted the SBA's Motion for Summary Judgment on the grounds that the cell phone records maintained by the service provider where not "agency records" as defined by the Freedom of Information Act and subsequently the SBA had no duty to recover them from its provider for disclosure to the ASBL.

Petitioner filed its notice of appeal on August 10, 2009. The Ninth Circuit's opinion was entered on October 15, 2020.

REASONS TO ALLOW THE WRIT

In holding that the 2007 amendment to FOIA defining "agency records" as including only those records maintained by private contractors who have a contract with the Agency for the sole purpose of "maintaining" agency records, the Ninth Circuit construes legislation which was clearly intended to expand the scope of FOIA in a manner which actually limits the reach of the Act. In so doing, it threatens the judicially created doctrine of constructive control recognized by other circuits and seeks to effectively supplant that doctrine with an overly restrictive interpretation of statute which severely limits the public's access to information.

As a result of the Ninth Circuit's disregard for the "strong presumption in favor of disclosure" as noted by this Court in *United States Department of State v. Ray*, 502 U.S. 164 (1991), Federal agencies are granted a new tool to avoid transparency-- the agencies need only allow a third party service provider to maintain possession of records reflecting that service. In such cases, citizens requesting documents under FOIA are left without any means of obtaining information that the agency leaves in the custody of its contactors. The Ninth Circuit has incorrectly decided an important question of federal law that has not been, but should be, settled by this Court. Moreover, in characterizing the 2007 amendment as "codifying" the judicially created doctrine of constructive possession, while simultaneously adopting a constricted interpretation of the scope of the amendment, the Court of Appeals has effectively -- and perhaps unintentionally--abrogated the constructive possession doctrine widely accepted by other circuits.

I. Review is Warranted to Resolve an Important Question of Federal Law

A. The Ninth Circuit's Determination That the Amendment "Codifies" the Constructive Control Theory Creates a Conflict Among the Circuits

Disclosure, not secrecy, is the dominant objective of the Freedom of Information Act. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Although FOIA contains specific exemptions that allow non-disclosure in certain narrow circumstances, the exemptions do not obscure the clear underlying policy of full disclosure. *Id.*

In this case, the Ninth Circuit adopted the position that the SBA had no obligation to produce the records requested because they were not in the SBA's immediate possession, and thus not records subject to disclosure under FOIA. The agency has the burden of demonstrating that the documents requested are not `agency records.'" *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C.Cir.1994); *see United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3, (1989); *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999). The Courts have consistently taken great care to ensure that "[t]he term `agency records' . . . not be manipulated to avoid the basic structure of the FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies." *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1494 (D.C.Cir.1984). As this Court has repeatedly stated, in enacting FOIA, "Congress sought to open agency action to the light of public scrutiny." *Tax Analysts*, 492 U.S. at 142, *see Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772, (1989).

With the passage of the OPEN Government Act, (Pub. Law No. 110-175 121 Stat. 2524) Congress added a new provision to FOIA specifically addressing the status of agency records that might be in the possession of government contractors. As amended, subsection (f)(2) of the FOIA defines a "record" to include:

> (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

> (B)any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

The above quoted section provides that when agency records are "maintained for an agency by an entity under Government contract, those records remain "agency records" subject to FOIA. Petitioners argued below that the clear language of the amendment encompasses any records maintained by a private contractor providing services to a federal agency concerning those services. The Ninth Circuit interpreted the amendment in an overly restrictive fashion, as applying only to private contractors retained for the sole purpose of providing "records management" services.

Petitioner's interpretation of the amendment is constant with the judicially created doctrine of constructive control, a rule supported by a well- established body of FOIA litigation in which records which were created by, and in the possession of' private parties under contract with the government were determined to be subject to disclosure under FOIA. See, *e.g Na Iwi Na Kapuna O Makapu v. Dalton*, 894 F. Supp. 1397 (D. HI 1995) (written inventory of Hawaiian remains created under contract with the U.S. Navy and in the possession of the Bishop Museum was determined to be an agency record); *In Defense of Animals v. National Institute of Health* 543 F. Supp. 2d 70, (D.D.C. 2008) (rejecting argument that records created and held by a contractor were not agency records; *Hercules v. Marsh*, 829 F. 2d 1027 (4th Cir. 1988) (phone directory created by a third party and in its possession an agency record) for FOIA purposes.

The Ninth Circuit's published opinion in this case curiously states that the amended language in 5 U.S.C. (f)(2)(B) at issue in this case "codifies the constructive control theory that only a handful of courts have applied in a handful of decisions" Opinion at 17088. Neither the cases cited above, nor any of the cases cited by Court of Appeals in support of this statement (*Burka v. U.S. Department of Health and Human Services*, 87 F.3d 508 (D.C. Cir 1996); *Missouri ex rel Garstang v. U.S. Dep't of Interior* 297 F. 3d 745 (8th Cir. 2002); *Bloomberg v Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 262 (S.D. N. Y. 2009)[1] involve documents "*maintained for an agency by an entity under Government contract, for the purposes of records management*" as that phrase was interpreted by the Ninth Circuit in this case. The Courts contention that the language at issue "codifies the constructive control theory" is absolutely inconsistent with the court's *interpretation* of that phrase. If the amendment codifies the constructive control theory as applied in the cited decisions, it cannot be limited to circumstances where the documents are in the custody of a contractor who has a contract limited in scope to document management services, as such a contract is never present in any of the cited cases.

On the other hand, based on the Ninth Circuit's restrictive construction of the language in question, and assuming, as the Court of Appeals did, that the amendment was intended to address case law underlying the constructive control doctrine, the Court's interpretation

1. The Court in *Bloomfield* declined to adopt the constructive control theory specifically under the facts present in that case. *Bloomberg v Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. at 275.

must be seen as abrogating, rather than codifying, the decisions in those cases, and holding that the constructive control doctrine is only applicable when the records are held by a third party solely for document management purposes. As a result, the Ninth Circuit has created a split in authority which must be addressed by this Court.

B. The Court of Appeal's Interpretation of the 2007 Amendment Misapplies Rules of Statutory Construction

In interpreting the phrase "maintained for an agency by an entity under Government contract, for the purposes of records management" as limiting the application of FOIA to agency records possessed by third parties only when the possession arises as the result of a document management contract, the Ninth Circuit incorrectly applied the rules of statutory construction to obtain a result which, as discussed above, apparently confused even the Court of Appeals. The doctrine of the last antecedent dictates that where one phrase of a statute modifies another, the modifying phrase applies to the *phrase* immediately preceding it. *Huffman v. Comm'r of Internal Revenue*, 978 F.2d 1139, 1145 (9th Cir.1992) In this case, the Ninth Circuit, rather than focusing on the preceding *phrase*, focused exclusively on one word within the preceding phrase -- "contract"-- to reach a result which limits the application of the subsequent phrase to "contracts for records management" . Correctly applied, the doctrine of the last antecedent is to be applied to the entire preceding phrase. It modifies "maintained for an agency under Government Contract" and thus clearly encompasses all cases in which a government contractor maintains agency records as part of its services to the agency.

In this case, the contractor – Verizon—provided invoices to the SBA reflecting telephone records which were the subject of ASBL's FOIA request. The SBA cannot, and does not dispute that such invoices are agency records subject to disclosure. Instead, the SBA asserts that it did not keep copies of the records *in its files.* However, the record below established that, part of the service Verizon provides its business clients is online access to "View current and/or archived historical bills", "Retrieve up to seven years history, depending on your billing systems via the Historical Invoice feature" and "Obtain an online image of current and historical invoices via the Historical Invoice feature". Clearly, such records would be maintained for the SBA by an entity under Government contract, for the purposes of records management and would be subject to the ASBL's FOIA request.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED OCTOBER 15, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16756

D.C. No. 3:09-cv-01098-EMC

AMERICAN SMALL BUSINESS LEAGUE,

Plaintiff-Appellant,

v.

UNITED STATES SMALL BUSINESS ADMINISTRATION,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, Magistrate Judge, Presiding

Submitted October 7, 2010*
San Francisco, California

Filed October 15, 2010

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* The panel unanimously concludes that this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

Before: David R. Thompson, Barry G. Silverman and M. Margaret McKeown, Circuit Judges.

Per Curiam Opinion

OPINION

PER CURIAM:

Plaintiff American Small Business League ("ASBL") appeals the adverse summary judgment ruling denying its July 2008 request under the Freedom of Information Act, 5 U.S.C. § 552, to compel Defendant United States Small Business Administration to produce Verizon Wireless cell phone records that the agency no longer possessed. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

In July 2008, ASBL filed a FOIA request with SBA seeking the telephone records for Michael Stamler, Director of the Small Business Administration Press Office during the years 2006 and 2007. SBA produced some documents pursuant to the request, but did not turn over copies of cell phone records for a government-issued BlackBerry used by Stamler during those years. Although SBA previously had possessed the 2006 and 2007 records, it did not retain them; Verizon had exclusive possession of the records. Unhappy with SBA's response to its FOIA request, ASBL filed this lawsuit seeking, *inter alia*, an order compelling SBA to search for and produce the requested records.

The district court ultimately granted SBA's motion for summary judgment. The court concluded that SBA had no

obligation under FOIA to retrieve the phone records from Verizon, per *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 148 n.10 (1989), and that the phone records did not qualify under FOIA's statutory definition of records, which covers information "maintained for an agency by an entity under Government contract, for the purposes of records management," 5 U.S.C. § 552(f)(2)(B). Both conclusions are sound.

First, the district court's finding that SBA did not control the records at the time of the FOIA request is not clearly erroneous. *See Milner v. U.S. Dep't of Navy*, 575 F.3d 959, 963 (9th Cir. 2009). It is undisputed that SBA did not actually possess the records in July 2008, and SBA had no obligation either to retain the records or to seek the records once they were no longer in its possession. *See Tax Analysts*, 492 U.S. at 145, 148 n.10. To the extent that an agency can constructively possess documents in the hands of third parties, *see Berry v. Dep't of Justice*, 733 F.2d 1343, 1349 (9th Cir. 1984), there is no evidence in the record showing that SBA extensively supervised or was otherwise significantly entangled with Verizon's production and management of the records. *See Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). Absent agency control, the records were not "agency records" subject to FOIA disclosure. *See Tax Analysts*, 492 U.S. at 145.

Second, the records do not come within the definition of "records" codified in 5 U.S.C. § 552(f)(2)(B). Section 552(f)(2)(B) requires production only of documents "maintained for an agency by an entity under Government contract, *for the purposes of records management*." 5 U.S.C. § 552(f)(2)(B)

(emphasis added). Here, it is undisputed that Verizon did not maintain the phone records pursuant to a records-management contract with SBA.

ASBL nevertheless contends that the comma separating "Government contract" from "for the purposes of records management" means that the statute covers all records maintained for an agency by a government contractor, no matter the purpose of the contract between them. This reading, however, contravenes the statute's plain language. As a matter of syntax, the latter phrase most naturally modifies only the former phrase. *See Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 832 (9th Cir. 1996). Moreover, this reading would impermissibly either excise the phrase "for the purposes of records management" from the statute or conflate that phrase with the word "maintain." *See United States v. Mitchell*, 502 F.3d 931, 948 (9th Cir. 2007) (observing "the 'settled principle of statutory construction that [courts] must give effect, if possible, to every word of the statute' " (quoting *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983))). And, "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). Accordingly, because § 552(f)(2)(B)'s language is unambiguous, ASBL's reliance on the statute's legislative history is misplaced. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

Contrary to ASBL's protestations, limiting the scope of § 552(f)(2)(B) to documents maintained by a third party

under a records-management contract does not render the statute meaningless. Section 552(f)(2)(B) codifies the constructive control theory that only a handful of courts have applied in only a handful of decisions—and which at least one court has recently rejected. *See, e.g., Burka*, 87 F.3d at 515 (applying the theory); *Missouri ex rel. Garstang v. U.S. Dep't of Interior*, 297 F.3d 745, 751 (8th Cir. 2002) (same). *But see Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F.Supp. 2d 262, 275 (S.D.N.Y. 2009) (declining to adopt *Burka*'s constructive obtainment and control theory). The statute obviates predictable legal battles over constructive control in the arguably common cases where a contractor maintains agency records pursuant to a records management agreement with the agency.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED JULY 1, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-09-1098 EMC

AMERICAN SMALL BUSINESS LEAGUE,

Plaintiff,

v.

UNITED STATES SMALL BUSINESS ADMINISTRATION,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION; GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; AND DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

(Docket Nos. 3, 7)

Plaintiff American Small Business League ("ASBL") has filed suit against Defendant the United States Business Administration ("SBA"), alleging a violation

of the Freedom of Information Act ("FOIA"). Currently pending before the Court is the SBA's motion to dismiss or, in the alternative, for summary judgment. The SBA argues that the case should be dismissed because ASBL failed to exhaust its administrative remedies prior to filing suit. In the alternative, the agency argues that it is entitled to summary judgment because the search for records that it conducted was reasonably calculated to produce responsive records.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the parties' supplemental briefs, and all other evidence of record, the Court hereby **DENIES** the motion to dismiss but **GRANTS** the alternative motion for summary judgment.

I. *FACTUAL & PROCEDURAL BACKGROUND*

On or about July 3, 2008, ASBL made a FOIA request to the SBA, asking for a copy of "[t]he telephone records for Mr. Michael Stamler, Director of the Small Business Administration Press Office during the years 2006 and 2007 in an electronic format." Compl., Ex. A (letter, dated 7/3/2008, from ASBL to SBA); *see also* Vellucci Decl. ¶ 7 (acknowledging FOIA request by ASBL on or about 7/3/2008).

Subsequently, on or about October 3, 2008, the SBA provided information to ASBL in an electronic format. *See* Compl., Ex. B (letter, dated 10/3/2008, from SBA to ASBL) ("The Agency is . . . providing the requested information

on the enclosed diskette in a *Microsoft Excel 2003* file.") (emphasis in original); *see also* Vellucci Decl. ¶ 7 (noting that floppy diskette was provided to ASBL in October 2008). The agency noted that six individual records were being withheld from disclosure pursuant to 5 U.S.C. § 552(b)(6) (providing for exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). *See* Compl., Ex. B (letter, dated 10/3/2008, from SBA to ASBL); *see also* Vellucci Decl. ¶ 8 (noting that six calls were deemed exempt from disclosure). The agency also noted that ASBL had the right to appeal the agency's decision to the Chief of the Freedom of Information/ Privacy Acts Office of the SBA. *See* Compl., Ex. B (letter, dated 10/3/2008, from SBA to ASBL)

Thereafter, ASBL did appeal the agency's decision on the basis that the electronic diskette provided was corrupted. *See* Vellucci Decl., Ex. 2 (letter, dated 11/6/2008, from ASBL to SBA). The SBA provided the information that it had previously supplied a second time, noting once again that ASBL had the right to appeal. *See* Vellucci Decl., Ex. 3 (letter, dated 11/17/2008, from SBA to ASBL).

ASBL was able to review the information this time around but did not believe that the information provided was sufficient. In a letter dated December 24, 2008, it explained:

> The information provided . . . came in the form of a Microsoft Excel workbook . . . and contained a single spreadsheet consisting of 369 rows of data. The data reflected calls from

> 2005, 2006 and 2007. According to the data provided, Mr. Stamler's telephone records consisted of 31 calls in 2005, 187 calls in 2006, and 151 calls in 2007. It is not believable that Mr. Stamler's phone records for that three-year period would consist of only 369 calls. *It is for this reason that we are appealing your decision and asking that you provide us with the telephone records for Mr. Michael Stamler, Director of the Small Business Administration Press Office during the years 2006 and 2007 in full and in an electronic format.*

Vellucci Decl., Ex. 4 (letter, dated 12/24/2008, from ASBL to SBA) (emphasis added).

On or about February 10, 2009, the Chief of the Freedom of Information/Privacy Acts Office of the SBA responded to the appeal. *See* Vellucci Decl., Ex. S (e-mail, dated 2/10/09, from SBA to ASBL). She noted that she had been informed that additional records had been located for the month of January 2007. These records were not provided previously because files had been corrupted and the SBA had been told by its telecommunications provider, Sprint, that replacement copies of the records were not available. However, subsequently, Sprint did provide replacement copies and the agency found twenty-two additional records responsive to ASBL's request. The Chief stated that

> there are no other records of calls made from [Mr. Stamler's] number other than those which have been previously reviewed and now the

> recently recovered twenty-two from January 2007. Beyond that single month of records, we have no explanation for the variance in call volume for that number during those years.

Vellucci Decl., Ex. 5 (e-mail, dated 2/10/09, from Chief to ASBL). The Chief then stated:

> In order to provide you with the fullest benefit of the FOIA, OCPL [Office of Communications and Public Liaison, *i.e.*, the office where Mr. Stamler worked] will now conduct an initial FOIA review of the twenty-two telephone records and respond directly to you with their disclosure determinations. *Therefore, this office will not conduct an appellate review of the records at this time.*

Vellucci Decl., Ex. 5 (e-mail, dated 2/10/09, from Chief to ASBL) (emphasis added).

Two days later, *i.e.*, on February 12, 2009, the SBA provided ASBL with information consistent with that described by the Chief. *See* Vellucci Decl. ¶ 13. The SBA stated that it had reviewed the information it had provided and found there to be only

> one gap. The subject telephone records for the month of January 2007 could not initially be read from the data on file with SBA, which was provided by its then telecommunications provider, U.S. Sprint Inc. In the interim,

> SBA contacted U.S. Sprint and has secured a replacement set of records for that month, from which the specific phone record data requested by ASBL has been extracted.

Compl., Ex. D (letter, dated 2/12/09, from SBA to ASBL). There were 22 calls for the month of January 2007. Each of these records was now being provided to ASBL – *i.e.*, there were no exclusions. The agency then noted that "no other records responsive to [ASBL's] request can be identified." Compl., Ex. D (letter, dated 2/12/09, from SBA to ASBL). The agency concluded by noting, once again, that ASBL had the right to appeal.

Subsequently, on March 12, 2009, ASBL filed the instant lawsuit. ASBL alleged that the SBA had violated FOIA by failing to make a full disclosure of records, as requested by ASBL. ASBL alleged:

> It is patently unbelievable that the Director of the SBA's Press Office – whose duties by definition involve communications outside the Agency, made an average of one phone call every three days [*i.e.*, 369 calls over a three-year period]. It is far more likely that the SBA has failed to make a good faith effort to conduct a search for the requested records using methods that can reasonably be expected to produce the information requested.

Compl. ¶ 9.

Appendix B

The SBA has now submitted, in conjunction with this motion, a declaration which addresses why there only 369 calls over a three-year period (not counting the January 2007 records) were identified. As a preliminary matter, the SBA notes that ASBL has mischaracterized the time period. "Plaintiff did not request records for 2005, but rather, only requested records for 2006 and 2007. . . . [T]he records that were voluntarily produced for 2005 were for one month [only], December 2005, and not for the entire year of 2005." Reply at 4 n.1. The SBA goes on to indicate that the number of calls (*i.e.*, 369) is under-representative for two reasons. First, according to the SBA, it could not provide any information about local telephone calls made by Mr. Stamler because the SBA "was billed [by Verizon, the agency's local telephone service provider,] a flat rate for local telephone calls during the period of 2006-2007." Vellucci Decl. ¶ 3(a). Therefore, "the local telephone billing records contain no information regarding individual local calls placed or received by SBA." Vellucci Decl. ¶ 3(a). Second, with respect to long distance telephone calls, for which the agency's provider is Sprint, the data records provide information for outgoing calls only, not incoming, *see* Vellucci Decl. ¶ 4; Forte Decl. ¶ 4; accordingly, not all calls in which Mr. Stamler participated would be documented. The SBA reviewed the data records provided by Sprint for information responsive to ASBL's request. *See* Vellucci Decl. ¶¶ 3(b), 5-7.

In turn, ASBL, in conjunction with its opposition and cross-motion for summary judgment, submitted a declaration as to why the search conducted by the SBA was, as a matter of law, not reasonable. ASBL notes that SBA used in its search of the Sprint data records only one

telephone number for Mr. Stamler – *i.e.*, (202) 205-6919, *see* Vellucci Decl., Ex. 1 (list of calls) – and that there is no evidence that Mr. Stamler used only this one number while acting in his capacity as a SBA employee. Based on ASBL's search of the SBA website, it uncovered at least two additional numbers for Mr. Stamler – *i.e.*, (202) 205-6740 x. 24 and (202) 481-4592. *See* Belshaw Decl. ¶¶ 3-4. The latter number is a fax number. *See* Belshaw Decl. ¶ 4. ASBL also questions whether Mr. Stamler may have used a government-issued cell phone.

In its reply brief, the SBA explains:

- A search of telephone records regarding (202) 205-6740 would not have yielded any responsive records. *See* Kuhns Decl. ¶ 8. That number is the main number for SBA's Office of Communications and Public Liaison. *See* Kuhns Decl. ¶ 7. Mr. Stamler's office telephone is not capable of dialing calls out from that number. *See* Kuhns Decl. ¶ 6. As for incoming calls, calls can reach Mr. Stamler through that number (if his extension, 24, is used or if administrative personnel at the main number transfer calls to his telephone line), *see* Kuhns Decl. ¶ 7, but, as noted above, Sprint's data records for long distance calls provide information for outgoing calls only, not incoming, *see* Vellucci Decl. ¶ 4; Forte Decl. ¶ 4, and "the local telephone billing records contain no information regarding individual local calls placed or received by SBA." Vellucci Decl. ¶ 3(a).

- (202) 481-4592 is a fax number and not a telephone number, and ASBL's FOIA request asked for telephone records. Furthermore, calls to the fax number do not

reach a telephone but rather reach a computer system that routes facsimiles to SBA employees' e-mails. *See* Kuhns Decl. ¶ 9.

- Although Mr. Stamler "is assigned an SBA Blackberry device with cellular telephone capability[,] [b]y the time of [ASBL's] FOIA request on July 3, 2008, SBA's records of Blackberry cellular telephone usage no longer included records from 2006 or 2007." Kuhns Decl. ¶ 5.

II. *DISCUSSION*

A. *Exhaustion*

The SBA argues first that the case should be dismissed for failure to exhaust administrative remedies. *See* 5 U.S.C. § 552(a)(6). The SBA does not dispute that ASBL appealed an agency decision on December 24, 2008. According to the SBA, the Chief made a timely decision on that appeal on February 10, 2009 – in effect, remanding ASBL's claim to the SBA so that the agency would have an opportunity to review the January 2007 records to see if there would be additional responsive records. However, ASBL did not wait to see what the agency would do and prematurely filed the instant lawsuit.

In response, ASBL makes two primary arguments. First, it argues that the Chief's decision on its appeal of December 24, 2008, was not timely. The Court does not agree. FOIA provides in relevant part that "[e]ach agency, upon any request for records made under paragraph

(1), (2), or (3) of this subsection, shall – . . . (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, ane legal public holiday) after the receipt of such appeal." 5 U.S.C. § 552(a)(6)(A)(ii). The Chief's decision indicates that she received the appeal on January 12, 2009. *See* Vellucci Decl., Ex. 5 (e-mail, dated 2/10/2009, from Chief to ASBL). Excluding weekends and Martin Luther King day (*i.e.*, January 19, 2009), the Chief had until February 10, 2009, to make a decision on ASBL's appeal. The Chief's decision was made on that very date.

Second, ASBL argues that the Chief's decision was, in effect, not a decision but rather a refusal to conduct an appellate review. This argument is not particularly persuasive. FOIA requires a determination to be made on the appeal, and it appears that the Chief did just that. In essence, she deemed the appeal premature because the SBA still had to review the January 2007 records. Notably, there is case authority indicating that a premature appeal defeats the very purposes of the exhaustion requirement.

In *Hidalgo v. FBI*, 344 F.3d 1256 (D.C. Cir. 2001), the plaintiff sent the FBI a FOIA request on December 13, 1999. *See id.* at 1257. The FBI had twenty days to respond. On December 29, 1999, *i.e.*, before that twenty days expired, the plaintiff appealed claiming incorrectly that the FBI had exceeded the time limit by which to provide a response. *See id.* On January 7, 2000, the FBI timely responded to the FOIA request, stating that the records sought were exempt from disclosure unless the plaintiff could provide certain information. The next day,

January 8, the OIP (*i.e.*, the entity designated to take FOIA appeals) responded to the appeal – apparently unaware of the FBI's response a day earlier. According to the OIP, even though FOIA authorized failure to act within the time limits as a denial, the OIP could not act until there had been an initial determination by the FBI. *See id.* Thereafter, the plaintiff filed an action in federal court, challenging the FBI's decision of January 7, 2000. *See id.*

The D.C. Circuit held that "permitting [the plaintiff] to pursue judicial review without benefit of prior OIP consideration would undercut 'the purposes of exhaustion,' namely, "preventing premature interference with agency processes, . . . affording the parties and the courts the benefit of [the agency's] experience and expertise, . . . [or] compiling a record which is adequate for judicial review."'" *Id.* at 1259. Significantly, the court rejected the argument that the plaintiff should have been deemed to have exhausted his administrative remedies based on his appeal of December 29, 1999, which was received by the OIP within 60 days of the FBI's decision of January 7, 2000. The appeal "did not promote the purposes of the exhaustion doctrine. As [the plaintiff] pursued [the appeal] before the FBI acted on his request, the appeal could not and did not place the substance of the FBI's response before the OIP. Thus, the OIP had no opportunity to consider the very issues that [the plaintiff] has raised in court . . . ." *Id.*

Hidalgo is distinguishable from the instant case because, here, the Chief did have an opportunity to

consider the very issue that the ASBL has now raised in this litigation (*i.e.*, that it is hard to believe that only 369 calls were made during a three-year period). In fact, the Chief effectively addressed that issue, stating that, except for the January 2007 records which were only recently obtained, "we have no explanation for the variance in call volume for that number during those years." Vellucci Decl., Ex. 5 (e-mail, dated 2/10/09, from Chief to ASBL). The only issue remaining was initial review of the newly discovered January, 2007 calls, records of which were eventually disclosed in full. Thus, any appeal to the Chief after the SBA reviewed the January 2007 records would have been futile. *Cf. SAIF Corporation/Oregon Ship v. Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990) (in worker's compensation case, noting that "[t]his court, along with every other circuit to consider the issue, has held that there is no exhaustion requirement if resort to the agency would be futile"; indicating that there is futility where the agency's position "appears already set" and "it is very likely what its result would have been"). Because of the likely futility of any appeal, the Court **DENIES** the SBA's motion to dismiss for failure to exhaust.

B. *Reasonableness of Search*

The SBA's second argument is that, even if there were no exhaustion problem, the search that it conducted was reasonable as a matter of law. As detailed above, the SBA has provided a detailed explanation as to why its search was reasonable. At the hearing on the SBA's motion, ASBL conceded as much, challenging only one issue related to the Blackberry used by Mr. Stamler. According to ASBL, even

if the SBA no longer had in its possession any telephone records for the Blackberry used by Mr. Stamler, the SBA could have obtained the records from its carrier, Verizon Wireless. Thus, the issue for the Court is whether or not, under FOIA, the SBA was obligated to obtain from Verizon Wireless the subject telephone records.

FOIA imposes an obligation on an agency only where its records -- *i.e.*, agency records -- are being requested. Two requirements must be satisfied in order for requested materials to qualify as agency records. "First, an agency must 'either create or obtain' the requested materials . . . ."[1] *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989). "Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control [the United States Supreme Court] mean[s] that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145. "The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' . . . ." *Id.* at 142 n.3. The Court concludes that, in the instant case, the SBA has satisfied its burden.

In the instant case, it is not disputed that the SBA did not create the Verizon Wireless telephone records. As to whether the SBA ever obtained the records, the agency basically admits that it did so; however, the SBA

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1. *Berry v. Department of Justice*, 733 F.2d 1343 (9th Cir. 1984), one of the cases cited by ASBL, simply underscores this requirement. *See id.* at 1348 (rejecting "an origination test to decide whether documents are agency records under the FOIA").

adds that, at the time that the FOIA request was made, it was no longer in possession of the records, and it had no obligation to retain the records. *See* Def.'s Supp. Br. at 3.

The SBA is correct that it had no obligation to retain the records under FOIA. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152 (1980) ("The [FOIA] does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained."); *see also Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) ("[T]he fact that responsive documents once existed does not mean that they remain in the [agency's] custody today or that the [agency] had a duty under FOIA to retain the records."); *Piper v. United States Dep't of Justice*, 294 F. Supp. 2d 16, 22 (D.D.C. 2003) ("FOIA does not impose a document retention requirement on government agencies.").

Thus, the only question is whether the SBA was nevertheless obligated to try to obtain the records from Verizon. It is not so obligated under FOIA. The Supreme Court has specifically stated that, "because Congress had not intended to 'obligate agencies to create or retain documents,' an agency should not be 'required to retrieve documents which have escaped its possession, but which it has not endeavored to recover.'" *Tax Analysts*, 492 U.S. at 148 n.10; *see also Forsham v. Harris*, 445 U.S. 169, 186 (1980) ("[T]he FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained.") (emphasis in original).

ASBL, however, still argues to the contrary, citing various appellate and district court opinions. The problem for ASBL is that each of these cases is distinguishable, particularly with respect to the "create or obtain" requirement. In each of these cases, the agency essentially contracted with a third party to make the records; therefore, the records were effectively created by the agency. *See, e.g.*, *Burka v. United States HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996) (noting that, even though third parties had technically created the records, the records were effectively created by the agency based on "the extensive supervision and control exercised by the agency over collection and analysis of the data [which] indicate[d] that these firms acted on behalf of [the agency] in creating the [records]"); *In Defense of Animals v. NIH*, 543 F. Supp. 2d 70, 76-77 (D.D.C. 2008) (indicating that the "create or obtain" prong was satisfied because, *inter alia*, the contract between the agency and the third party required the third party to maintain records associated with the agency-owned animals); *Na Iwi Na Kapuna O Makapu v. Dalton*, 894 F. Supp. 1397, 1411 (D. Haw. 1995) (holding that the "create or obtain" prong was satisfied because the agency had contracted with a third party to prepare the inventory records). The Court acknowledges that ASBL seems to rely on these cases more for the "control" requirement instead of the "create or obtain" requirement but, as noted above, both of these requirements must be met in order for materials to be considered agency records. ASBL cites no authority requiring a governmental agency to obtain records from an independent third party who was not obligated to create and maintain records on the agency's behalf.

Appendix B

ASBL's final argument that the telephone records at issue are agency records is based on the language used in FOIA itself. FOIA defines the term "record" as follows:

> (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and
>
> (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

5 U.S.C. § 552(f)(2). ASBL focuses on the language in § 552(f)(2)(B) as evidence that the telephone records maintained by Verizon Wireless constitute agency records.

There does not appear to be any dispute that Verizon Wireless is a government contractor. *See* Def.'s Supp. Br. at 1 n.1 ("Defendant has a government contract with Verizon Wireless for Blackberry wireless service."). But § 552(f)(2) on its face requires that the contractor be hired for the purposes of records management. *See also* Pl.'s Supp. Br. at 5 (admitting such; also citing 110 S. Rpt. 59 (2007), which states that "[t]his section clarifies that agency records kept by private contractors licensed by the government to undertake recordkeeping functions remain subject to FOIA just as if those records were maintained by the relevant government agency"). In the instant case, the SBA has hired Verizon Wireless to provide wireless service. Simply because Verizon offers to give its

customers, *e.g.*, historical information does not mean that Verizon was hired for purposes of records management.

Because, for the reasons stated above, the undisputed evidence of record demonstrates that the Verizon Wireless telephone records are not agency records, the SBA is entitled to summary judgment on ASBL's FOIA claim.

III. *CONCLUSION*

For the foregoing reasons, the Court denies the SBA's motion to dismiss but grants the SBA's motion for summary judgment and denies ASBL's cross-motion.

This order disposes of Docket Nos. 3 and 7.

IT IS SO ORDERED.

Dated: July 1, 2009

/s/
EDWARD M. CHEN
United States Magistrate Judge